

1 *Interbond Corp. of Am. v. Hitachi, Ltd.*,
2 No. 11-cv-06275;

3 *Interbond Corp. of Am. v. Technicolor SA*,
4 No. 13-cv-05727;

5 *Office Depot, Inc. v. Hitachi, Ltd.*,
6 No. 11-cv-06276;

7 *Office Depot, Inc. v. Technicolor SA*,
8 No. 13-cv-05726;

9 *CompuCom Sys., Inc. v. Hitachi, Ltd.*,
10 No. 11-cv-06396;

11 *P.C. Richard & Son Long Island Corp. v.*
12 *Hitachi, Ltd.*,
13 No. 12-cv-02648;

14 *P.C. Richard & Son Long Island Corp. v.*
15 *Technicolor SA*,
16 No. 13-cv-05725;

17 *Schultze Agency Servs., LLC v. Hitachi, Ltd.*,
18 No. 12-cv-02649;

19 *Schultze Agency Servs., LLC v. Technicolor SA*,
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25 *Sears, Roebuck and Co. and Kmart Corp. v.*
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6)
7 *All Indirect Purchaser Actions*)
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9)

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1 **I. INTRODUCTION**

2 Plaintiffs allege that Defendant Koninklijke Philips N.V. (f/k/a Koninklijke Philips Electronics
3 N.V. (“KPNV”) violated section 1 of the Sherman Act by knowingly entering into an agreement with
4 other Defendants to fix the prices of CRTs. While Plaintiffs alleged involvement by KPNV, and
5 survived dismissal under Rule 12(b)(6), they can no longer hide behind conjecture and speculation. In
6 responding to this Motion, Plaintiffs were finally required to show their cards with regard to evidence
7 supporting their claim against KPNV—but discovery has left them empty-handed. Plaintiffs have
8 failed to identify evidence establishing a genuine issue of material fact with regard to whether KPNV
9 “knowingly” joined the conspiracy. *See Kendall v. Visa U.S.A. Inc.*, No. C 04-04276 JSW, 2005 WL
10 2216941, at *2 (N.D. Cal. July 25, 2005).

11 Like many large corporate organizations, the businesses of Philips are managed at a high level
12 by a holding company with a small number of employees—a very small number in the case of
13 KPNV—and then those businesses are operated around the globe through separately incorporated
14 subsidiaries that collectively employ hundreds of thousands of individuals, as was the case with the
15 other “Philips” defendants, Philips Electronics North America Corporation, Philips Taiwan Limited,
16 and Philips do Brasil, Ltda. (collectively, the “Philips Subsidiaries”). In that arrangement, under
17 fundamental corporate law principles, KPNV is a legally separate entity from the Philips Subsidiaries
18 and cannot be held liable for their acts absent a showing of agency or vicarious liability. Because no
19 evidence in the record suggests that KPNV knowingly agreed to join the alleged conspiracy, KPNV
20 moved this Court for an award of summary judgment on all claims against it. Plaintiffs oppose
21 KPNV’s Motion on two primary grounds, neither of which can withstand scrutiny.

22 First, Plaintiffs essentially concede they have no direct evidence linking KPNV to the alleged
23 conspiracy, *see* Opp’n at 14–15, but argue that KPNV’s agreement can be inferred from three
24 categories of circumstantial evidence—the general corporate structure of Philips, general interactions
25 between employees of KPNV and employees of the Philips Subsidiaries, and the formation of LG
26 Philips Display (“LPD”). *Id.* at 15–21. Under Plaintiffs’ theory, these points demonstrate that KPNV
27 exercises such significant control over its subsidiaries that it would be reasonable for a fact finder to
28

infer that KPNV “must have” intentionally and voluntarily joined the alleged conspiracy. That theory, divorced of any relationship to the alleged conspiracy itself, is premised on such an unsupportable leap in logic that the Court should reject it out-of-hand, as acceptance of it is the admission of unadulterated speculation. Moreover, all of the circumstantial evidence that purportedly shows extreme control by KPNV over its subsidiaries involves nothing more than run-of-the-mill interactions between a holding company parent and its subsidiaries.

Second, Plaintiffs argue that, even assuming KPNV is correct that it did not knowingly join the alleged conspiracy, an issue of material fact exists over whether KPNV can be held liable based on the conduct of its alleged agent—Philips Display Components (“PDC”). *See* Opp’n at 22–25.¹ Plaintiffs fail, however, to note that PDC is not a named Defendant, that it is not an incorporated entity,² and that it is not mentioned a single time in any of Plaintiffs’ Complaints.³ In other words, on the eve of trial, Plaintiffs have decided to introduce a completely new theory of liability that is premised on the relationship between KPNV and (the non-entity) PDC, as opposed to the relationship between KPNV and the Philips Subsidiaries. The Ninth Circuit has made clear that this type of sandbagging violates

¹ Plaintiffs do not argue that LPD was the agent of KPNV or that the veil protecting LPD’s shareholders should be pierced under an alter ego theory. *See generally* Opp’n. Therefore, Plaintiffs extended discussion about the operation of LPD is essentially irrelevant. *See id.* at 8–12.

² [REDACTED] *See* Ex. 1, Jan De Lombaerde Dep. Tr. (10/9/2014) at 37:13–19 [REDACTED]

All references to exhibits in this motion refer to exhibits attached to the accompanying Declaration of Tiffany B. Gelott.

³ *See* Sears Roebuck and Co. and KMart Corp., 2nd Am. Compl. ¶¶ 41–45 (identifying the purportedly relevant Philips-related entities) (Oct. 3, 2013); Sharp Compl. ¶¶ 32–37 (June 17, 2013) (same); Circuit City, 1st Am. Compl. ¶¶ 44–48 (Oct. 3, 2013) (same); Target Corp., 2nd Am. Compl. ¶¶ 39–43 (Oct. 3, 2013) (same); Best Buy Co., Inc. *et al.*, 1st Am. Compl. ¶¶ 45–49 (Oct. 3, 2013) (same); Viewsonic Corp., Compl. ¶¶ 31–35 (May 30, 2014) (same); Indirect Purchaser Plaintiffs, 4th Consol. Am. Compl. ¶¶ 54–58 (Jan. 10, 2013) (same).

the notice pleading requirements of Federal Rule of Civil Procedure 8.⁴ For that reason, the Court should wholly disregard Plaintiffs’ agency argument. However, even if the Court applies Plaintiffs’ PDC argument to *each* of the Philips Subsidiaries, Plaintiffs have still fallen woefully short in attempting to create an issue of material fact on the issue of agency. The touchstone consideration of whether a subsidiary is the agent of its parent corporation is day-to-day operational control. Plaintiffs must show that KPNV “extensively controlled” its subsidiaries to the point where the subsidiaries effectively lacked their own identity. None of the evidence identified by Plaintiffs even arguably shows that KPNV dominated the day-to-day control of its subsidiaries. Instead, the evidence shows only a holding company setting general policies and goals with subsidiaries then responsible for applying those policies and achieving those goals.

II. APPLICABLE LEGAL STANDARDS

A. Conspiracy to Violate Section 1 of the Sherman Act

Participation in a price-fixing agreement “c[an] only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged.” *United States v. United States Gypsum Co.*, 438 U.S. 422, 463 (1978). Where a defendant who is alleged to have engaged in concerted price fixing moves for summary judgment, “the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement.” *In re Citric Acid Litig.*, 191 F.3d 1090, 1093 (9th Cir. 1999). The plaintiff must show that the defendant “knowingly” joined the alleged scheme. *Kendall*, 2005 WL 2216941, at *2.⁵

⁴ See *Oliver v. Ralph’s Grocery Co.*, 654 F.3d 903, 909 (9th Cir. 2011) (finding that allegations first raised in an expert report were properly not considered by district court); *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968–69 (9th Cir. 2006) (holding that where “the complaint gave the Appellees no notice of the specific factual allegations presented for the first time in [plaintiff’s] opposition to summary judgment” such allegations could not support plaintiff’s opposition).

⁵ In *Serfecz v. Jewel Food Stores, Inc.*, the court granted the defendants’ motion for summary judgment because plaintiffs’ evidentiary showing that there was an agreement was based on “only speculation, hunch, and theory.” No. 92 C 4171, 1994 WL 478576, at *13 (N.D. Ill. Aug. 31, 1994). The court explained that it was not enough to show that two defendants may have reaped a benefit of the allegedly anticompetitive conduct or that they had a “confluence of interest” in a certain outcome. *Id.*

(Continued...)

1 Plaintiffs “can establish a genuine issue of material fact by producing either direct evidence that
 2 [KPNV] conspired to fix [CRT] prices or circumstantial evidence from which a reasonable fact finder
 3 could conclude that [KPNV] so conspired.” *In re Citric Acid*, 191 F.3d at 1093. “Direct evidence in a
 4 Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the
 5 proposition or conclusion being asserted.” *Id.* at 1094.

6 Where a plaintiff relies on circumstantial evidence, he is entitled to “the benefit of all
 7 reasonable inferences” from the evidence. *Id.* However, “conduct as consistent with permissible
 8 competition as with illegal conspiracy does not, standing alone, support an inference of antitrust
 9 conspiracy.” *Id.* “Instead, an inference of conspiracy is sustainable only if reasonable in light of the
 10 competing inferences of independent action, and to survive a motion for summary judgment a plaintiff
 11 seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that
 12 the alleged conspirators acted independently.” *Id.* (citations, brackets, and ellipsis omitted).⁶

13 **B. Liability of Parent Corporation for Acts of Its Subsidiary**

14 “The independence of a subsidiary from the parent corporation is to be presumed.” *E. & J.*
 15 *Gallo Winery v. EnCana Energy Services, Inc.*, No. CV F 03-5412 AWI LJO, 2008 WL 2220396, at *5
 16 (E.D. Cal. May 27, 2008). “Only in unusual circumstances will the law permit a parent corporation to
 17 be held either directly or indirectly liable for the acts of its subsidiary.” *Bowoto v. Chevron Texaco*
 18 *Corp.*, 312 F. Supp. 2d 1229, 1234 (N.D. Cal. 2004). One of those “unusual” situations is where a
 19 principal-agent relationship is formed.⁷ To show agency, “[a]s a practical matter, the parent must be

20 _____
 21 (...Continued)

22 Because there was not “sufficient evidence to support an inference of participation in an illegal
 antitrust conspiracy,” defendants were entitled to an award of summary judgment. *Id.*

23 ⁶ See also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (“antitrust law
 24 limits the range of permissible inferences from ambiguous evidence in a § 1 case”).

25 ⁷ Plaintiffs assert that agency in the context of the Sherman Act claim is governed by federal common
 26 law, and that KPNV has conceded this point. See Opp’n at 23 n.115. KPNV has not conceded any
 27 point, and reserves all rights regarding which law governs Plaintiffs’ agency claim (assuming it has
 been properly raised), but will assume for the sake of argument that federal common law applies for
 purposes of this Motion only.

1 shown to have moved beyond the establishment of general policy and direction for the subsidiary and
 2 in effect taken over performance of the subsidiary's day-to-day operations in carrying out that policy."
 3 *E. & J. Gallo Winery*, 2008 WL 2220396, at *11.⁸ The "touchstone" in considering whether a
 4 subsidiary is the agent of the parent is "day to day control." *Sun Microsystems Inc. v. Hynix*
 5 *Semiconductor, Inc.*, 622 F. Supp. 2d 890, 899 (N.D. Cal. 2009).

6 In an apparent attempt to avoid that well-established construct, Plaintiffs seem to suggest that
 7 there is an alternative approach to assessing whether a parent corporation can be held accountable for
 8 the acts of its subsidiaries. See Opp'n at 15 (citing *Nobody in Particular Presents, Inc. v. Clear*
 9 *Channel Commcn's, Inc.* ("NIPP"), 311 F. Supp. 2d 1048, 1070 (D. Colo. 2004) and *BanxCorp v.*
 10 *Apax Partners, L.P.*, No. 10-cv-4769, 2011 WL 1253892, at *4 (D.N.J. Mar. 28, 2011)).

11 But the Plaintiffs are relying on a standard that does not exist or, at best, is not controlling. As
 12 an initial matter, whether the Colorado district court in *NIPP* intended to depart from the standard
 13 agency test is unclear, see *NIPP*, 311 F. Supp. 2d at 1069 (analogizing "control or direction" to the
 14 conduct of "any principal directing the conduct of an agent"), and Plaintiffs have identified no court in
 15 the Ninth Circuit that has considered direct participation under a "control or direction" theory. In fact,
 16 irrespective of *NIPP*, courts in the Ninth Circuit continuously have held a parent responsible for the
 17 acts of its subsidiary only where the subsidiary is the agent or alter ego of the parent.⁹ Further, the

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 19 ⁸ See also *Black v. JP Morgan Chase & Co.*, Civ. Action No. 10-848, 2011 WL 4102802, at *32 (W.D.
 20 Pa. Aug. 10, 2011) (explaining that "activities that constitute standard parent-subsidiary interactions,
 21 such as the parent corporation appointing the subsidiary's officers and directors, influencing executive
 22 compensation, approving budgets, gathering information about corporate performance, and receiving
 23 distributions of subsidiary profits, do not reflect daily, operational control"); *Court-Appointed Receiver*
 24 *of Lancer Offshore, Inc. v. Citco Group Ltd*, No. 05-60055-CIV, 2011 WL 1232986, at *4 (S.D. Fla.
 25 Mar. 30, 2011) ("In order for a parent company to be liable for its subsidiary's acts under an agency
 26 theory, the parent must exercise control to the extent that the subsidiary has 'no separate corporate
 27 interests of its own and functions solely to achieve the purposes of the dominant corporation.'").

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 29 ⁹ See, e.g., *In re Fresh and Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1171 (D. Idaho
 30 2011) ("Plaintiffs have not plausibly alleged that Potandon's separate corporate status should be
 31 ignored under any alter ego or agency theory of liability."); *In re California Title Ins. Antitrust Litig.*,
 32 No. C 08-01341, 2009 WL 1458025, at *7 (N.D. Cal. May 21, 2009) ("Thus, to state a claim against
 33 the Parent Corporations, Plaintiffs either must set forth facts establishing direct participation in the
 34 alleged conspiracy or set forth sufficient allegations showing that the Parent Corporations are

(Continued...)

1 application of the *NIPP* court’s logic to this case is doubtful. The *NIPP* court considered the Supreme
 2 Court’s holding in *Copperweld v. Independence Tube*, 467 U.S. 752 (1984) that a parent and
 3 subsidiary cannot conspire with each other for section 1 purposes because they are a single economic
 4 enterprise, and then appears to have relied upon that theory in assessing the parent’s direct
 5 participation in the alleged conspiracy. *NIPP*, 311 F. Supp. 2d at 1069. If the *NIPP* court was relying
 6 on *Copperweld*’s single economic entity theory to lessen the showing a plaintiff must make to hold a
 7 parent liable for the conduct of its subsidiary, then that view is apparently in the distinct minority—
 8 courts, in this Circuit and others, have routinely rejected such an expansion of *Copperweld*, and this
 9 Court should do the same.¹⁰

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 14 (…Continued)

15 vicariously liable for the acts of their subsidiary corporations.”); *Sun Microsystems Inc.*, 622 F. Supp.
 16 2d at 901 (considering “whether, as an alternative to establishing [parent]’s liability via its relationship
 17 and contacts with [its subsidiary], plaintiff has sufficient evidence to suggest that [parent]
 18 independently participated in any alleged DRAM conspiracy”).

19 ¹⁰ See, e.g., *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 341 n.44 (3d Cir. 2010) (“Contrary to
 20 plaintiffs’ suggestion, however, it does not follow from *Copperweld* that subsidiary entities are
 21 automatically liable under § 1 for any agreements to which the parent is a party. As a matter of well-
 22 settled common law, a subsidiary is a distinct legal entity and is not liable for the actions of its parent
 23 or sister corporations simply by dint of the corporate relationship.”); *Perez v. State Farm Mut. Auto.*
 24 *Ins. Co.*, No. C 06-01962 JW, 2011 WL 5833636, at *3 (N.D. Cal. Nov. 15, 2011) (“Nothing in the
 25 *Copperweld* opinion speaks to the question of whether the fact that a plaintiff has Article III standing
 26 to sue a parent corporation means that the plaintiff also has Article III standing to sue a wholly owned
 27 subsidiary of that corporation.”); *In re Processed Egg Products Antitrust Litig.*, 821 F. Supp. 2d 709,
 749 (E.D. Pa. 2011) (rejecting expansion of *Copperweld* and explaining that “Plaintiffs’ proposed basis
 for imputing liability premised on a ‘single enterprise’ theory is unsupported by legal authority and
 does not provide occasion to disregard the separate corporate forms of these entities and impose
 liability on them.”); *In re Florida Cement and Concrete Antitrust Litig.*, 746 F. Supp. 2d 1291, 1323–
 24 (S.D. Fla. 2010) (rejecting expansion of single economic theory, in part, because “Plaintiffs do not
 explain why, if *Copperweld* eliminated antitrust liability for cooperation between parent corporations
 and subsidiaries like VCNA and Prestige, VCNA should be held liable for Prestige’s alleged
 participation in the concrete conspiracy in this case.”).

1 **III. ARGUMENT**

2 **A. Plaintiffs have failed to identify any evidence suggesting that KPNV knew about**
 3 **the alleged conspiracy let alone knowingly agreed to join it.**

4 As discussed above, Plaintiffs can point to no evidence showing that any employee of KPNV
 5 had actual knowledge of the alleged conspiracy or that KPNV participated in the alleged conspiracy.
 6 Instead, Plaintiffs ask this Court to infer KPNV's agreement from circumstantial evidence, *see* Opp'n
 7 at 15–21, which limits the inferences that can be drawn from that evidence. But nothing about the
 8 evidence cited by Plaintiffs supports an inference that KPNV knowingly joined the conspiracy.

9 **1. Nothing about the use of business groups and subsidiaries to organize a**
 10 **global, multi-billion dollar corporate family implies that KPNV directly**
 11 **participated in the alleged conspiracy.**

12 Plaintiffs spend considerable time discussing the corporate structure of Philips, and specifically
 13 KPNV's use of a Board of Management and Product Divisions to manage its investments. *See* Opp'n
 14 at 2–7. Plaintiffs do not assert that the origination of this corporate structure had anything to do with
 15 the alleged conspiracy. Rather, Plaintiffs ask this Court to infer participation from the mere existence
 16 of a Board of Management and Product Divisions. The gist of their argument seems to be that the
 17 structure of Philips is such that KPNV exercises control over the operations of its subsidiaries, which
 18 makes it impossible to reach any conclusion except that KPNV knowingly participated in the alleged
 19 conspiracy. But all of the evidence cited is completely consistent with the legitimate operation of a
 20 large, multi-billion global corporation, and none of it suggests that the corporate structure itself is
 21 probative of whether KPNV directly participated in the alleged conspiracy.

22 For example, Plaintiffs rely heavily on a statement in the preamble to the Philips Company
 23 Manual [REDACTED]

24 [REDACTED] Opp'n at 2 (citing Ex. 3 at 1). But that
 25 generic statement, and others like it, says [REDACTED]

26 [REDACTED] Similarly, Plaintiffs do not argue that KPNV
 27 approval regarding [REDACTED]

1 [REDACTED]
 2 [REDACTED]. See Opp'n at 4.¹¹

3 As another example, Plaintiffs cite [REDACTED]
 4 [REDACTED]

5 [REDACTED] See Opp'n at 4 (citing Ex. 11). [REDACTED]
 6 [REDACTED]

7 [REDACTED].¹²

8 Plaintiffs stretch so far as to seek support from [REDACTED]
 9 [REDACTED]
 10 [REDACTED]

11 [REDACTED]¹³ Yet, other than summary
 12 conclusions, Plaintiffs never explain why the use of "One Philips" evidences anticompetitive behavior,
 13 just as the slogan "One Thousand Philipses" would not disprove the question.¹⁴

14 The insufficiency of the evidence relied on by Plaintiffs is highlighted when compared to
 15 allegations that were found to have stated a claim in *Precision Associates, Inc. v. Panalpina World*
 16 [REDACTED]

17 _____
 18 ¹¹ See *United States v. Bestfoods*, 524 U.S. 51, 72 (1998) (explaining that appropriate parental
 19 involvement includes "monitoring of the subsidiary's performance, supervision of the subsidiary's
 20 finance and capital budget decisions and articulation of general policies and procedures").

21 ¹² See Ex. 11 at 1 to Pls.' Opp'n to KPNV Mot. for Summ. J. [REDACTED]
 22 [REDACTED]

23 *id.*
 24 [REDACTED]
 25 [REDACTED]

26 ¹³ See Ex. 2, Frans Spaargaren, Rule 30(b)(6) Deponent for KPNV, Dep. Tr. (11/5/2014) at 66:4–24
 27 ; *id.* at 78:20–25 [REDACTED]
 28 [REDACTED]

¹⁴ Cf. *E. & J. Gallo Winery*, 2008 WL 2220396, at *6–*7 ("The common law of agency clearly
 establishes that how the parties or entities refer to themselves or one another is not determinative of a
 principal/agent relationship.").

1 *Transport, Ltd.*, No. CV-08-42 (JG)(VVP), 2013 WL 6481195, at *17 (E.D.N.Y. Sept. 20, 2013).
 2 There, the court held that the plaintiffs had adequately alleged direct participation by the parent
 3 corporation in the anticompetitive conduct of its subsidiary by asserting that “the price-fixing
 4 conspiracies alleged herein would not have worked unless there was involvement from both the parent
 5 company and its subsidiaries.” *Id.*

6 In sum, nothing about the standard corporate structure that KPNV employs to manage its
 7 investments supports an inference that KPNV knowingly participated in the alleged conspiracy.

8 **2. Nothing in the employment history of Gerald Kleisterlee suggests that**
 9 **KPNV directly participated in the alleged conspiracy.**

10 Desperate for any connection between KPNV and the alleged conspiracy, Plaintiffs turn to
 11 Gerald Kleisterlee. *See* Opp’n at 5–7. Plaintiffs, of course, have no evidence whatsoever that
 12 Kleisterlee actually knew or approved of the alleged conspiracy. Their argument is entirely indirect
 13 and, in fact, demands wholesale speculation.

14 Plaintiffs begin by comparing the fact that Kleisterlee was CEO of Philips Taiwan (a named
 15 Defendant) from 1996 through 1998 with the fact that [REDACTED]

16 [REDACTED] *See id.* at 6. However, Plaintiffs do not argue that

17 [REDACTED]
 18 [REDACTED] 15

19 Therefore, [REDACTED]

20 [REDACTED]

21 [REDACTED] Plaintiffs “guilt by association”
 22 standard is not the applicable law.

23 Plaintiffs next focus on Kleisterlee’s time as an employee of KPNV, which began in January
 24 1999. *See* Opp’n at 6. Plaintiffs seem to attribute significance to the fact that Kleisterlee selected Jim

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 26 ¹⁵*See Doe ex rel. Doe v. State of Hawaii Dept. of Educ.*, 351 F. Supp. 2d 998, 1013 n.31 (D. Haw.
 27 2004) (“Although knowledge of a public employee can be imputed to a public employer, the Court
 28 finds no reason to extend the doctrine to impute a public employer’s knowledge to its employees.”).

1 Smith to replace David Chang as head of PDC's Asia Pacific Region. *Id.* However, again, Plaintiffs
 2 fail to explain how [REDACTED]

3 [REDACTED]
 4 [REDACTED] ¹⁶ [REDACTED]
 5 [REDACTED] *see id.* at 7 n.33, [REDACTED]

6 [REDACTED]
 7 [REDACTED] *See id.* at 17. By this standard, every attendee at every meeting would be charged with the
 8 knowledge of every other attendee, whether the information was discussed or not. In sum, absent pure
 9 speculation, Kleisterlee's one-time employment by KPNV certainly cannot be used to create an issue
 10 of material fact concerning KPNV's alleged knowing agreement.

11 **3. Nothing about the formation and operation of LPD suggests that KPNV**
 12 **directly participated in the alleged conspiracy.**

13 In discussing the formation and operation of LPD as evidence of KPNV's *direct* participation
 14 in the conspiracy (as opposed to the participation of LPD or the Philips Subsidiaries), *see* Opp'n at 8–
 15 12, Plaintiffs again lose sight of fundamental antitrust and corporate law principles: KPNV is a non-
 16 controlling shareholder of LPD and therefore is presumed to be separate from LPD absent a finding of
 17 vicarious liability under Dutch law. *See* Mot. at 16–25 (discussing veil piercing standards under Dutch
 18 law). Ignoring that reality, Plaintiffs discuss LPD as if it were a subsidiary of KPNV. But the
 19 evidence is undisputed that LPD is not a subsidiary of KPNV, *see* Mot. at 5–7 (collecting evidence),
 20 and Plaintiffs do not argue that the corporate veil protecting LPD should be pierced so as to hold the
 21 shareholders (KPNV and LG) liable for its acts. *See generally* Opp'n. Thus, Plaintiffs cannot simply
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24 ¹⁶ *See* Ex. 3, Jim Smith Dep. Tr. (12/12/2013) at 279:5–7 [REDACTED]
 25 [REDACTED]; *see also* Ex. 2, Frans Spaargaren, Rule 30(b)(6)
 26 Deponent for KPNV, Dep. Tr. (11/5/2014) at 135:14–25 [REDACTED]
 27 [REDACTED] Ex. 4, Roger De Moor, Rule
 28 30(b)(6) Deponent for KPNV, Dep. Tr. (7/31/2012) at 201:10–13 [REDACTED]

1 treat the actions of LPD employees or agents as imputed to KPNV in opposing KPNV's Motion. For
2 that reason, most of Plaintiffs' discussion concerning the formation and operation of LPD is inapposite.

3 The thrust of Plaintiffs' argument concerning LPD is continuation. They argue that because the
4 underlying mechanics of the conspiracy did not change when the Subsidiaries divested their CRT
5 manufacturing assets, it is reasonable to assume that nothing else changed either, including KPNV's
6 knowing participation. *See id.* at 18–21. That argument, however, obviously assumes that KPNV had
7 already knowingly joined the conspiracy. But there is no evidence that KPNV in fact knew about the
8 conspiracy prior to (or indeed after) the formation of LPD. *See supra*, at 10 n.15. [REDACTED]

9 [REDACTED]
10 [REDACTED].¹⁷
11 Finally, Plaintiffs' reliance on KPNV's appointment of members of LPD Supervisory Board is
12 unavailing. For similar reasons that officers who hold positions with both the parent and the subsidiary
13 "can and do change hats to represent the two corporations separately, despite their common
14 ownership," *Bestfoods*, 524 U.S. at 69–70, there is nothing inherently problematic with KPNV
15 selecting its own employees or employees of its subsidiaries to sit on the Supervisory Board, especially
16 where Dutch law requires that supervisory board members be independent.¹⁸ At the very least,

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19 ¹⁷ Without citing any support, Plaintiffs assert that KPNV's decision to form LPD with LG shows an
20 intent to participate in the alleged conspiracy. *See Opp'n* at 18. That unsupported assertion stands in
21 stark contrast to the testimony of Spaargaren, [REDACTED]

22 [REDACTED] Ex. 2, Frans Spaargaren, Rule 30(b)(6)
23 Deponent for KPNV, Dep. Tr. (11/5/2014) at 38:6–39:4. In fact, as several courts have recognized,
24 there are many legitimate reasons why two corporations would form a joint venture. *See In re Fresh*
25 *and Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d at 1174 (finding formation of joint venture was
26 not evidence of conspiratorial agreement because of "obvious alternative explanation" for its
27 formation); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 377 (M.D. Pa.
28 2008) (finding that parent's decision to sell subsidiary was "entirely consistent" with parent's pursuit
of its own economic interests and did not support an inference that parent participated in wrongful
conduct allegedly engaged in by subsidiary).

¹⁸ Under Dutch law, members of the LPD Supervisory Board were required to act in the best interests
of LPD. *See* Dutch Civil Code Art. 2:250 ("In the performance of their duties the Supervisory
Directors (members of the Supervisory Board) shall be guided by the interests of the Corporation and

(Continued...)

1 Plaintiffs have not explained why the appointment of members of the Supervisory Board suggests
 2 knowing agreement, especially where KPNV was a non-controlling shareholder of LPD.

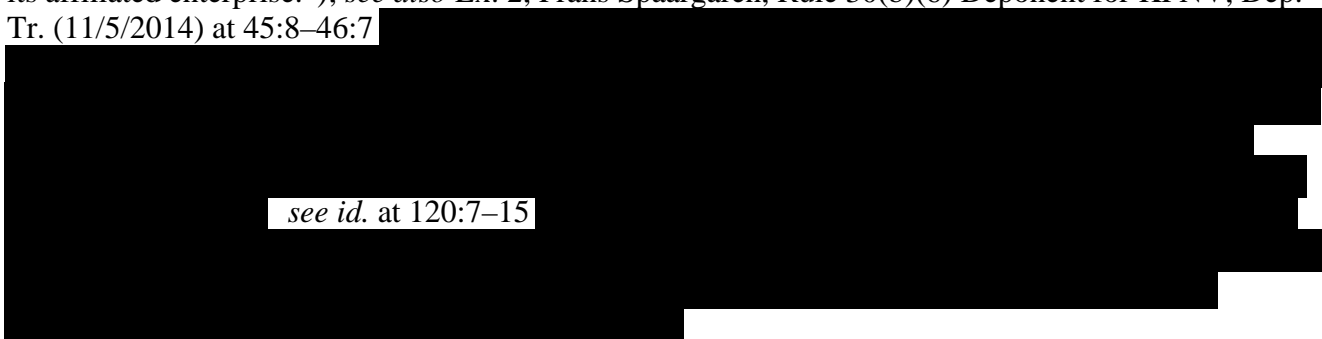
3 **4. Plaintiffs cannot rely on the hearsay statements of the European**
 4 **Commission or the Delaware Court of Chancery to oppose summary**
 5 **judgment.**

6 Although Plaintiffs discuss statements made by the European Commission and the Delaware
 7 Court of Chancery concerning the alleged conspiracy, *see* Opp'n at 21, the Court should give no
 8 weight to those documents. "A trial court can only consider admissible evidence in ruling on a motion
 9 for summary judgment." *Jim v. County of Hawaii*, 33 Fed. App'x 857, 858 (9th Cir. 2002). And "[i]t
 10 is black-letter law that hearsay evidence cannot be considered on summary judgment for the truth of
 11 the matter asserted." *Bhatti v. Trustees of Boston University*, 659 F.3d 64, 71 (1st Cir. 2011). That
 12 approach "makes sense" because "[t]here is no way to test the reliability of an amorphous, out-of-court
 13 statement or to gage the intentions or credibility of the person who made the statement." *Id.*

14 As the Ninth Circuit explained in *United States v. Sine*, "judicial findings of facts are hearsay,
 15 inadmissible to prove the truth of the findings unless a specific hearsay exception exists." 493 F.3d
 16 1021, 1036 (9th Cir. 2007). Likewise, in *Chevron Corp. v. Bonifaz*, a civil suit for malicious
 17 prosecution, the court held that Chevron could not introduce a court order sanctioning Bonifaz for his
 18 conduct in bringing certain claims. No. 09-05371 CW, 2010 WL 1948681, at *6 (N.D. Cal. May 12,
 19 2010). After noting that findings of fact by another tribunal are hearsay in federal court, the *Bonifaz*

20 _____
 21 (...Continued)

22 its affiliated enterprise."); *see also* Ex. 2, Frans Spaargaren, Rule 30(b)(6) Deponent for KPNV, Dep.
 23 Tr. (11/5/2014) at 45:8–46:7

24 
 25 *see id.* at 120:7–15
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1 court explained that “Chevron offers no hearsay exception or controlling authority to establish that
 2 these findings are admissible for their truth. The sanctions order constitutes competent evidence that
 3 Bonifaz was sanctioned, but the underlying findings made in support thereof are hearsay and not
 4 admissible for their truth.” *Id.* Because Plaintiffs do not offer any explanation as to why those
 5 opinions of the European Commission and the Delaware Court of Chancery would be admissible for
 6 the truth of the statements within them, the Court should not consider them in resolving KPNV’s
 7 Motion.¹⁹

8 **B. Plaintiffs have not alleged that PDC has any connection to the alleged conspiracy**
 9 **and have failed to identify any evidence that the Philips Subsidiaries were the**
 10 **agents of KPNV.**

11 Initially, the Court should refuse to consider Plaintiffs’ agency theory. Federal Rule of Civil
 12 Procedure 8(a)(2) requires that “the allegations in the complaint give the defendant fair notice of what
 13 the plaintiff’s claim is and the grounds upon which it rests.” *Pickern*, 457 F.3d at 968 (citation
 14 omitted). Plaintiffs’ Complaints are by and large identical as to the Philips-related entities: Each
 15 Complaint names KPNV and the three Philips Subsidiaries as Defendants, and alleges that KPNV

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 17 ¹⁹ However, even if the Court could consider the proffered hearsay, it would not support Plaintiffs’
 18 theories, in part because Plaintiffs’ presentation of it is less than accurate. Plaintiffs assert that “two
 19 independent tribunals concluded that Royal Philips knew about the conspiracy,” and that the Delaware
 20 Chancery Court “concluded that there was sufficient admissible evidence in the record to support a
 21 reasonable inference that Royal Philips was aware of LPD’s and its other subsidiaries’ participation in
 22 an illegal price fixing cartel.” Opp’n at 21. Plaintiffs fail to note that the Court of Chancery explained
 23 that “the EC’s findings regarding [KPNV]’s liability for LPD’s actions were in fact predicated on
 24 theories of imputed liability unique to EU competition law,” and that “the EC decision did not find that
 25 [KPNV] participated in the CRT price fixing cartel directly, either before or after the formation of
 26 LPD, or that it had actual knowledge of LPD’s price fixing activity.” *Vichi v. Koninklijke Philips*
 27 *Electronics, N.V.*, 85 A.3d 725, 783 (Del. Ch. 2014). Further, the Chancery Court was considering a
 28 completely different issue than raised here. The Chancery Court considered KPNV’s knowledge of the
 alleged conspiracy in the context of assessing whether the plaintiff had proven scienter with respect to
 the alleged fraud of KPNV, and in doing so, the court appears to have imputed knowledge of former
 employees of subsidiaries of KPNV to KPNV without considering whether such imputation was
 appropriate. *See id.* at 809–10. But “knowing” about the conspiracy is not enough—Plaintiffs must
 prove a knowing *agreement*. Nothing in the *Vichi* decision, or its discussion of the EC’s decision,
 supports an inference that KPNV knowingly entered into an agreement to fix prices of CRTs, and
 tellingly, Plaintiffs have not argued that *Vichi* has any preclusive effect here.

1 “dominated and controlled the finances, policies and affairs of” each of the three Subsidiaries. *See*,
 2 *e.g.*, Sears/KMart 2nd Am. Compl. ¶¶ 41–45.²⁰ Although Plaintiffs do include generic agency
 3 allegations as to unnamed co-conspirators and then name several entities purportedly involved in the
 4 alleged conspiracy but who are not named as Defendants, *see, e.g., id.* ¶¶ 67–75, none of the
 5 Complaints provide any hint that Plaintiffs intend to pursue a claim against KPNV based on a
 6 principal-agency relationship with PDC.

7 At the eleventh hour, however, Plaintiffs now assert that “[t]he relevant relationship for the
 8 Court’s agency analysis is between Royal Philips and PDC because PDC’s employees, who were
 9 located at various Philips subsidiaries including Defendants PENAC, Philips Taiwan, and Philips do
 10 Brasil, attended conspiracy meetings and fixed CRT prices.” Opp’n at 22 n.114. But Plaintiffs cite no
 11 evidence supporting the idea that PDC had *any* employees, and that is because PDC did not have any
 12 employees. Whatever “individuals” Plaintiffs are referring to, they were not merely “located” at
 13 subsidiaries, they were employees of those subsidiaries. Why Plaintiffs did not argue that a principal-
 14 agent relationship exists between KPNV and the Philips Subsidiaries is irrelevant. The only pertinent
 15 fact is that they did not make that argument. Instead, they chose to advance a new theory that is not
 16 supported by any allegations in the Complaints. Because Plaintiffs failed to properly notice their new
 17 theory, the Court should refuse to consider it. *See Pickern*, 457 F.3d at 968–69.

18 Even assuming that the Court treated Plaintiffs’ agency argument as if it had been made against
 19 each individual Subsidiary, it still must fail.²¹ Plaintiffs have provided no evidence that KPNV
 20 dominated the day-to-day control of the Philips Subsidiaries, and none should be assumed by the
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23
 24 ²⁰ Sharp also names Philips Consumer Electronics Co. as a Defendant. *See* Sharp Compl. ¶ 35.

25 ²¹ Plaintiffs’ failure to distinguish between the Subsidiaries in making its agency argument further
 26 illustrates that Plaintiffs have no evidence showing day-to-day control over any entity by KPNV.
 27 Plaintiffs would apparently have this Court find that their agency argument applies to every single
 28 subsidiary within the Philips corporate family, yet they cite no support for such a broad holding,
 especially on these facts.

1 Court.²² In fact, the record demonstrates that KPNV did *not* exercise day-to-day control over its
 2 subsidiaries.²³ Thus, the same reasons why Plaintiffs' evidence does not show direct participation are
 3 the same reasons why Plaintiffs have failed to show a genuine material fact as to their agency theory.

4 CONCLUSION

5 For the foregoing reasons, the Court should enter an Order granting judgment in favor of
 6 KPNV on all of Plaintiffs' claims.

7 Dated: January 23, 2014

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 15 *Attorneys for Defendant Koninklijke Philips N.V.*
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18 ²² See *E. & J. Gallo Winery*, 2008 WL 2220396, at *10 (explaining that agency finding requires “more
 19 than the supervision of finance and capital budget decisions and responsibility for the setting of general
 20 policies and procedures for the subsidiary”); *Sun Microsystems Inc.*, 622 F. Supp. 2d at 899–901
 (“Thus, the degree of control exercised by the parent in order for the subsidiary to qualify as an agent
 must therefore exceed that which is to be expected in the normal scope of any such relationship.”).

21 ²³ See, e.g., Ex. 2, Frans Spaargaren, Rule 30(b)(6) Deponent for KPNV, Dep. Tr. (11/5/2014) at
 22 79:20–23

Ex. 4, Roger De Moor, Rule 30(b)(6) Deponent for
 23 KPNV, Dep. Tr. (7/31/2012) at 30:1–32:6

id. at 33:14–34:12

id. at 70:1–5

; *id.* at 79:2–5